IN THE

Supreme Court of the United States

October Term, 1970

No. 70-5138

PAUL PARHAM and ELLEN PARHAM et al.,
Appellants

v.

SEARS, ROEBUCK and CO. et al., *Appellee*

BRIEF FOR SEARS, ROEBUCK AND CO., APPELLEE

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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QUESTION PRESENTED

Was not the lower Court correct in granting Appellee's Motion for Dismissal and Summary Judgment where the facts show that the Appellee was in possession of personal property to which it was rightfully entitled and the Appellants admitted that they had no rights in the said personal property either at the time of the replevin of such property by Appellee or at any time thereafter?

STATEMENT

The Appellant, Paul Parham, and the Appellee, Sears, Roebuck and Co., entered into a certain transaction on February 1, 1969, whereby possession of certain personal

property was delivered to the Appellant by the Appellee subject to a security interest and agreement complying with the Uniform Commercial Code of Pennsylvania and the Pennsylvania Goods and Services Installment Sales Act, 69 Purdon's Pennsylvania Statutes Annotated 636 (App. 67, 71, 72). By virtue of the said transaction and agreement, title to the said personal property remained at all times in the Appellee. Further, the Appellant granted to the Appellee the right to repossess the personal property upon Appellant's default in any of the terms of the transaction and agreement (App. 67, 72).

The Appellant did default in his obligations under the said agreement and transaction (App. 67, Para. 4; App. 73). The Appellee gave the Appellant numerous notices of the Appellant's default and also notified the Appellant of its desire and intent to retake possession of the goods in accordance with the terms of the agreement (App. 68, Para. 5; App. 74, 75).

Appellee, acting through the Sheriff of Philadelphia County, did retake possession of the goods in accordance with its rights under the Uniform Commercial Code of Pennsylvania, 12A Purdon's Pennsylvania Statutes Annotated 9-503, the Pennsylvania Goods and Services Installment Sales Act and the Pennsylvania laws and rules of Civil Procedure relating to the action of replevin with bond. The retaking of possession was entirely peaceable, the wife of the Appellant admitting the Sheriff to the residence of the Appellant for this purpose (Paras. 6 and 7, App. 68).

Thereafter the present action was instituted by the Appellants, Paul and Ellen Parham, against the Appellee, Sears, Roebuck and Co. The present action requests the Court to order the Appellee to return to the Appellants the personal property involved and also asks the Court to enter a temporary and permanent injunction against the Appellee which would forbid any future actions of replevin with bond.

It is, of course, to be noted that the Appellant, Ellen Parham, is improperly joined in this action since she was not a party to the transaction involving the personal property involved nor did she at any time nor at the present time have any rights therein.

The lower court granted summary judgment of dismissal in favor of all defendants. The plaintiffs, Parham and Washington, have appealed, but the plaintiffs, Epps, have not.

SUMMARY OF ARGUMENT

The Appellant, Paul Parham, had no right of title or possession in the replevied goods at the time of the replevin or thereafter. To do otherwise than grant summary judgment to the Appellee would be a useless, expensive and unjust imposition upon the Appellee, which had title and the right to immediate possession in the replevied goods and has already suffered loss because of the Appellant's failure to comply with his payment schedule and his failure to return the goods to the Appellee.

To authorize a class action would likewise be useless and unjust since the class of plaintiffs would have to be persons who had and have no right to title or possession in the replevied goods. Such persons would obviously have no right to any type of recovery.

The particular facts of this case are of the greatest importance to the Appellee. The Appellee had and has title and right to possession, it gave notice of its rights and intentions to the appellant, it requested him to comply with his payment schedule before replevying, and it replevied peaceably, gaining entrance to the premises of the Appellant by permission. To deny to the Appellee its clearly established rights on the hypothesis that someone might possibly in another case abuse the constitutional rights of some unidentified person would be unjust and would in fact

deprive the Appellee of its constitutional rights without the due process of law required by the Fifth and Fourteenth Amendments.

The right to immediate possession upon default is a right granted by the Uniform Commercial Code which has been enacted in 49 states. The right to replevin originated in Pennsylvania in 1705. Its purpose is to give immediate possession to those wrongfully deprived of their property. But for this remedy, many persons so wronged would have no right whatsoever except to obtain a worthless judgment. This would be particularly true in cases involving mobile property, stolen goods, and goods which may disappear unless promptly sequestered.

Both the Uniform Commercial Code and the Pennsylvania Statutes and Rules relating to replevin contain substantial protections for the party against whom the replevin is made and substantial sanctions against the party replevying wrongfully.

Until and unless there is shown a clear and actual abuse of constitutional rights, neither the statutes nor the rules should be declared unconstitutional. Even when such an abuse be shown, the court's decision should be solely and carefully aimed at the particular abuse. To act generally may cause substantial injustice to parties whose rights and needs are not before the Court.

The lower Court's granting of Appellee's Motion for Summary Judgment should therefore be affirmed.

ARGUMENT

The Summary Judgment granted by the lower court must be sustained since the appellants have shown no rights in the replevied property and demonstrated no violation of their constitutional rights.

There can be no question but that the Appellants, Parham, have admitted that whatever right they may have ever possessed in the personal property involved arose from a certain agreement executed between the Appellant, Paul Parham, and the Appellee, Sears, Roebuck and Co., on February 1, 1969. The Appellants have further admitted that there was a default by the Appellant, Paul Parham, in reference to the said agreement. The agreement, upon such default, gave the Appellee the right to immediate possession of the personal property in which the Appellee had retained title. After numerous notices of the default and its intentions to exercise its right to possession thereof, the Appellee exercised such right in accordance with the Uniform Commercial Code of Pennsylvania, 12A Purdons Pennsylvania Statutes Annotated 9-503, the Goods and Services Installment Sales Act of Pennsylvania and the statutes and rules concerning the action of replevin. The Appellants admit that the Appellee acted entirely in accordance with its rights under the said laws and the agreement executed in accordance therewith, and that there was a peaceable taking of the personal property with no force or violence of any sort (Para. 7, App. 68).

It is quite obvious, therefore, that at the present time and at the time the state replevin action and the instant action were instituted, the Appellants had no right whatsoever to the personal property involved. They had no right to possession nor did they have title thereto. For this Court to order the said personal property returned to the Appellants would, therefore, be not only a vain and temporary

gesture but would be a clear violation of the legal rights of the Appellee as established by the Uniform Commercial Code of Pennsylvania, the agreement executed thereunder, the admissions of the Plaintiffs in their Complaint and the Stipulation of Facts agreed to by the Appellants, Parham, and the Appellee, Sears, Roebuck and Co. (App. 67).

Further litigation would be a useless, expensive and unjust imposition upon the Appellee, which, by the Appellant's own admissions in the Stipulation (App. 67), has done no wrong and has already suffered loss and a deprivation of its rights solely because of Appellant's breach of his contractual duties owing to Appellee and his failure to surrender to Appellee Appellee's own property until legal action was actually instituted. The granting of the prayer of Appellant's complaint would be to render a decision clearly ignoring the facts established in evidence. It would, therefore, be a judicial deprivation of property without due process of law in violation of Appellee's rights under both the Fifth and Fourteenth Amendments of the Constitution.

The Appellants in their various Briefs, Memoranda of Law and Pleadings consistently argue that the particular facts of the case before this Court are of no importance. They state that this Court should exercise its power to declare the statutes of the Commonwealth of Pennsylvania unconstitutional even though it has before it no evidence of an actual abuse of anyone's constitutional rights. They contend that the Court should ignore and penalize the actual Appellee before it because some other party in some other case at some other time may have or may in the future violate somebody's constitutional rights by a misuse of the statutory authority conferred by the Commonwealth. The common law requirement that there be an actual dispute before the Court and actual injured parties was established to prevent this type of manifest injustice. Hypotheses should not be substituted for facts nor actual litigants regarded as surplusage.

In the case of *Parham v. Sears, Roebuck and Co.*, the lower court's dismissal would appear to be the only proper decision. If the Appellants are to prevail, the Court must find the constitutional violation in the companion cases or in the attempted class action. The Epps case was not appealed and is, therefore, not before this Court. The Findings of Fact of the lower court in the Washington case (App. 29) appear to establish clear equity and right on the side of the Appellee in that matter.

As to a class action, the Attorney General of Pennsylvania on Page 3 of his Brief clearly establishes that a class action should not be permitted.

If a class action were permitted, the plaintiffs in such class action would have to consist of plaintiffs who do not own and have no right to possession of the goods replevied at the time of the replevin. The defendants in such an action would have to be parties who have full rights of title and possession, both now and at the time of the replevin, and whose rights were being violated by the plaintiffs. It is to be noted that the statutes of Pennsylvania and the Rules of Civil Procedure promulgated thereunder allow replevin solely to parties having rights of possession and title. Nowhere do the statutes or rules give any authority for a forceable breaking and entering of real estate and in none of the instant cases did such a breaking and entering occur (App. 90, 91, Para. 9, 10; App. 68, 69, Para. 7, 12). The class, as defined above, would seem to have no right on which to base a decision in its favor. Thus, even the allowance of a class action would be an empty gesture imposing further penalties on the Appellee.

Replevin is an ancient procedure in effect in Pennsylvania since 1705. Its purpose is to prevent irreparable harm to the owners of personal property where there is a danger of the said personal property disappearing or being severely damaged. It has been used over the years by numerous individuals, corporations, banks, finance com-

panies, automobile dealers and the United States Government itself to protect themselves against the depredation of persons refusing to comply with their just contractual obligations and having no right whatsoever in the goods replevied. The right existed at the time of the Constitutional Convention and was being excercised in the City of Philadelphia under the very statute now under attack at the very moment that that Convention sat in Independence Hall. The matters in which replevin may be used involve a wide spectrum of substantive rights. It is often essential to the recovery of stolen goods, to prevent the removal or concealment of mobile personal property by persons having no right thereto, and to prevent the denial of clear property rights to persons entitled thereto. To declare this remedy unconstitutional on the basis of hypothetical possibilities may well cause extremely substantial harm to persons who are being deprived of their rights illegally and to whom this swift and efficient remedy is the only practical solution. Without the most serious and widespread consideration of all of the many instances where replevin is of value, a court should not strike down the remedy and thus aid private individuals to deprive others of their rights under the Fifth and Fourteenth Amendments. It would seem that any change in replevin procedures so ingrained within the law throughout the years is solely a prerogative of the legislature and not of the courts.

Further, the replevin statutes of Pennsylvania contain strong protections for the debtor. The plaintiff in a replevin action must file a bond in double the value of the goods replevied, and the party replevying is liable for substantial damages in the event of a wrongful replevin. (App. 59, para. 7; App. 69, para. 13) The defendant in such an action can immediately petition the court to adjust the bond and may litigate the right to possession and title and any damages he may have sustained due to a wrongful seizure of his goods. No counterbond is necessary for the defendant to take the above steps. The replevin ac-

tion is never ended until judgment is entered by the court and all rights of the defendant to the above procedures remain unaffected until such judgment is entered. Thus, in the instant cases, the Appellants have substantial state rights which they could have pursued in the state courts if they in fact have any valid right to the goods replevied. Such rights still remain open to them. [App. 69]

The Appellants put great emphasis on the case of *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820 (1969). The Court, speaking through Justice Douglas, emphasized in that case that it was outlawing the summary procedure complained of because of the fact that the wages garnisheed were clearly the property of the person against whom the garnishment was made and that such wages were property of a very specific type, much different from what is ordinarily regarded as personal property.

The Court further noted at 395 U.S. 339, 23 L. Ed. 2d 352 that garnishment of wages did not present a situation where "special protection to a state or creditor interest" was involved.

It is to be noted that the Court of Appeals for the Tenth Circuit in the case of *Brunswick Corp. v. J. P. Inc.*, 424 F. 2d 100, 105 (1970) held that the doctrine of the *Sniadach* case does not apply to the enforcement of a creditor's rights under a security interest authorized by the Uniform Commercial Code. The court also clearly held that once the debtor had admitted default under the security agreement the rights of the creditor to immediate possession were perforce admitted. Thus, there was nothing to litigate. The United States District Court for the Southern District of Florida held to the same effect in the case of *Fuentes v. Faircloth* which is being argued contemporaneously with the instant case.

The provisions of the Uniform Commercial Code, effective in forty-nine of the fifty states, authorize the citizens of those states to contract between themselves as to title, possessory interests, liens, and the remedies to en-

force such rights among themselves. Article 9 of that Code, as now existent, represents the work of many years by legal scholars and commercial experts. 12A Purdons Pennsylvania Statutes Annotated 9-503 provides for the right of the secured party to take possession of collateral upon default and to proceed by writ of replevin. Such title retention agreements with their remedial provisions are widespread and innumerable throughout the nation. To say, without serious studies of the widespread effects which may result, that part or all of the type of agreement authorized by the Uniform Commercial Code cannot be entered into because of constitutional prohibitions is to tread on extremely dangerous ground. This again would seem to be a policy decision that should be left to the legislature. To say that commercial practices so established throughout the nation and so ancient are now unconstitutional should only be done after the most thorough study and analysis—the type of analysis that is difficult if not impossible for a court but is peculiarly within the province of a legislative study committee.

Not only do the replevin statutes and rules grant substantial protection to the debtor, but the Uniform Commercial Code also does so. Even after the replevin has been consummated, the party replevying under a Security Agreement must comply with all the provisions as to disposition of the goods contained in 12A Purdons Pennsylvania Statutes Annotated 9-504 et seq.

It is therefore respectfully submitted that this Court should not make a general declaration of unconstitutionality in matters of this nature until a specific violation of constitutional rights is before it. Then only should it act and even then its action should be carefully aimed at the particular violation or abuse. The mere fact that a statute or rule may be abused should not be sufficient ground to deny its efficacy to those who are using it properly in order to protect their essential rights. To act broadly where so many different individuals and divergent interests may be affected may in fact cause substantial injustice to inno-

cent parties of whom the Court has no knowledge and whose rights and needs are not before the Court.

CONCLUSION

Under the above circumstances, it is respectfully submitted that the Court below had no alternative but to grant the Appellee's motion for summary judgment in the case of *Paul Parham and Ellen Parham v. Sears, Roebuck and Co.*, and that this Court should affirm that decision.

Respectfully submitted,

ROBERT F. MAXWELL
Attorney for Sears, Roebuck and Co., Appellee

September 3, 1971